

JUN - 7 1993

In the Matter of

Amendment of Parts 32, 36, 61, 64
and 69 of the Commission's Rules
to Establish and Implement
Regulatory Procedures for Video
Dialtone Service

RM-8221

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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OFFICE OF THE SECRETARY

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REPLY COMMENTS OF CONSUMER FEDERATION OF AMERICA
AND THE NATIONAL CABLE TELEVISION ASSOCIATION

The Consumer Federation of America and the National Cable Television Association, Inc. (collectively, "Petitioners") hereby reply to the comments submitted in response to their Joint Petition for Rulemaking and Request for Establishment of a Joint Board ("Joint Petition"). The Joint Petition called upon the Commission to commence a rulemaking to establish cost allocation and other implementing rules for video dialtone service, and to create a Federal-State Joint Board to recommend procedures for separating the cost of local telephone plant used jointly to provide telephone and video dialtone services.

INTRODUCTION AND SUMMARY

When the Commission authorized telephone companies to offer video dialtone service, it left critical implementation questions unresolved. The Commission declined to establish video dialtone-specific jurisdictional separations, cost allocation, pricing and consumer safeguard standards. Instead, the Commission determined that it could fashion such standards in the context of individual

applications for authorization to construct video dialtone facilities. The flawed video dialtone applications pending before the Commission, which would burden basic service ratepayers with the substantial costs of video dialtone facilities, make clear that an ad hoc approach cannot effectively address what is a generic problem.

For these reasons, Petitioners have sought the institution of a rulemaking proceeding to establish video dialtone-specific rules governing cost accounting and allocation, access charges and price caps, and joint marketing and privacy. Petitioners have also requested the establishment of a Federal-State Joint Board to recommend the proper allocation of plant used jointly for telephone and video transmission services.^{1/}

The Joint Petition is supported by a wide range of consumer advocates, state regulators, and private telecommunications companies. All of them urge the Commission to develop implementing rules for video dialtone that will safeguard consumers and competition in the markets for video and telecommunications services. Such rules will impose a uniformity on the regulatory treatment accorded video dialtone. By

^{1/} Petitioners also requested that the Commission hold pending video dialtone applications in abeyance and refrain from accepting any new applications until the rulemaking is completed. Alternatively, Petitioners asked that any grants of authority to offer video dialtone prior to the adoption of these new procedures be conditioned on compliance with the procedures. Joint Petition at 5. Commenters looking for "evidence" that Petitioners' goal is to delay the implementation of video dialtone, see p. 3, supra, emphasize the former request, ignoring the less restrictive alternative put forward by Petitioners.

instituting a generic rulemaking, as Petitioners have proposed, the Commission will also ensure that state regulators and consumer advocates will have a meaningful opportunity to participate in the formulation of these safeguards. Such an opportunity would likely be foreclosed to these groups and individuals -- because of their relative lack of resources -- if

more than an attempt to delay competition.^{6/} In fact, it is the telephone industry that stands to benefit if the Commission delays adopting implementing rules for video dialtone. In the absence of such rules, telephone companies will retain the "flexibility" to design their own regulatory schemes. Indeed, the comments received in response to the Joint Petition illustrate the divergent and inconsistent regulatory treatment of video dialtone being advanced by local exchange carriers. If this disuniformity is allowed to persist and flourish, it will be impossible for regulators to prevent the cross-subsidization and cost misallocation that the Joint Petition seeks to address.

I. IN VIEW OF THE ISSUES RAISED BY PENDING VIDEO DIALTONE APPLICATIONS, THE COMMISSION MUST ACT PROMPTLY TO ESTABLISH VIDEO DIALTONE-SPECIFIC SAFEGUARDS

The filing of video dialtone applications^{7/} transformed the theoretical controversies over separations and costing raised in the video dialtone proceeding into matters that require immediate attention. The pending applications raise fundamental policy issues, such as the proper allocation of costs between video and telephone service, that must be addressed head-on in a

^{6/} See, e.g., Comments of the United States Telephone Association at 2 (filed May 21, 1993); Opposition of the Ameritech Operating Companies at 4 (filed May 21, 1993); Comments of Pacific Bell and Nevada Bell at 2.

^{7/} Application of New Jersey Bell Telephone Company (Florham System), File No. W-P-C-6838 (filed Nov. 16, 1992); Application of New Jersey Bell Telephone Company (Dover System), File No. W-P-C-6840 (filed Dec. 15, 1992). See also "U S West Announces Plan to Deploy Broadband Network Across Its Service Territory," Telecommunications Reports, Feb. 8, 1993, at 6-8.

comprehensive proceeding, rather than on an ad hoc, piecemeal basis.^{8/}

The Joint Petition, and the Hatfield Associates study appended thereto, demonstrate the need for urgent Commission action. The existing regulations fail to embrace the new realities created by video dialtone. They do not ensure that video dialtone costs are placed in appropriate accounting categories, that these costs are assigned between regulatory jurisdictions, or that regulated and non-regulated costs associated with the various aspects of video dialtone service are appropriately allocated. As a result, basic ratepayers could find themselves paying billions of dollars each year to

Utility Consumer Advocates ("NASUCA") notes, "failure of the Commission to promptly identify and implement adequate separations and allocation mechanisms will likely lead to the subsidization of interstate services by intrastate services, and of new video services by telephone service."^{11/}

Continued reliance on the section 214 process to guard against cross-subsidization, as advocated by a number of telephone industry commenters,^{12/} is inadequate for the reasons set forth in the Joint Petition.^{13/} As the D.C. Public Service Commission suggests, such an ad hoc approach also denies consumer advocates and state regulators, who lack the resources to review and comment upon every video dialtone application, an effective means of participating in the formulation and enforcement of video dialtone safeguards. The development of safeguards on a case-by-case basis, with the input of a shifting group of commenters, virtually ensures the adoption of inconsistent regulatory methodologies and, consequently, increased difficulty in policing and preventing anti-consumer and anti-competitive conduct.^{14/}

^{11/} Comments of NASUCA at 1-2. See also Initial Comments of NARUC at 4 (citing with approval the Joint Petition's conclusion that "when the FCC authorized video dialtone services, it left critical implementation issues unresolved").

^{12/} See Comments of U S West at 2-4; BellSouth Comments at 2, 16.

^{13/} See Joint Petition at 5-10.

^{14/} See Comments of D.C. PSC at 3-4.

II. THE COMMENTS SUPPORT ADOPTION OF THE VIDEO DIALTONE-SPECIFIC REGULATIONS REQUESTED BY THE JOINT PETITION

The Joint Petition explains in detail that the existing arrangements set forth in Parts 32, 36, 61, 64 and 69 of the Commission's rules are inadequate to address the regulatory challenges posed by video dialtone. In the absence of a uniform regulatory structure, Petitioners argued, telephone companies will devise their own approaches to inter-service and inter-jurisdictional cost allocation. Several of the comments filed in response to the Joint Petition bear out Petitioners' concern. NYNEX, for instance, suggests in its comments that video dialtone should be characterized as a private line "wideband" service,^{15/} while Bell Atlantic classifies video dialtone as a "special access" service.^{16/} These disparate approaches to

cost allocation and their approach will significantly increase the

be misallocated under the existing rules. Petitioners' concern is illustrated by New Jersey Bell's initial proposal to assign to its telephone ratepayers one hundred percent of the cost of fiber trunks to be installed in conjunction with its video dialtone service.^{18/} If existing rules are not refined to properly account for and allocate these investments, similar efforts will surely be undertaken by telephone companies across the country.

A. A Joint Board Must Be Convened to Address Separations Issues

The Joint Petition requested that the Commission establish a Federal-State Joint Board specifically for the purpose of determining the appropriate inter-jurisdictional separation of plant used jointly for video dialtone and local telephone service. Petitioners argued that creation of a specialized Joint Board is necessary to avoid the jurisdictional mismatching of video dialtone revenues and costs that will occur as a result of the Commission's determination that the basic video dialtone ~~is an interstate service~~^{19/} Again, comments filed in

As the California Public Utilities Commission points out, if video dialtone is exclusively an interstate service, the Commission is "obligated to devise a means of ensuring that all the costs associated with the provision of video dialtone be allocated exclusively to the federal jurisdiction."^{20/} Even some of the telephone companies concede the need for separations reform, but argue for deferring the video dialtone separations question for resolution as part of the larger review of the separations process recently undertaken by the Commission and the state commissions^{21/} -- a strategy for delay that could saddle intrastate ratepayers with billions of dollars in costs without compensating revenues in the meantime.

The telephone companies argue, despite separations rules that fail to match video dialtone costs with revenues, that a Joint Board is not needed to protect ratepayers. BellSouth and NYNEX attempt to discount the concern with jurisdictional mismatching by suggesting that the Petitioners "read too much" into the Commission's statement that video dialtone is an interstate service,^{22/} suggesting that, in their view, jurisdictional issues remain unsettled. The Southern New England Telephone Company ("SNET") likewise argues that the current

^{20/} Comments of California at 3 n.1.

^{21/} See BellSouth Comments at 6-7; Comments of the National Telephone Cooperative Association at 3 (filed May 21, 1993); see also Comments of U S West at 7; Opposition of Bell Atlantic at 8.

^{22/} See BellSouth Comments at 15; Comments of NYNEX at 11-12.

separations rules are adequate because they are "flexible" and do not "automatically or arbitrarily" assign video dialtone costs to either jurisdiction.^{23/}

Inadvertently, these comments prove the Petitioners' point. Current separations rules do not require the appropriate assignment of plant used jointly for video dialtone and basic telephone service. The Commission should not leave the choice of allocation methodology to the telephone companies themselves, whose strong incentive is to misallocate costs. The more appropriate course is to establish a Joint Board to address the issue of video dialtone separations now.^{24/}

B. New Regulations Are Required to Properly Account For the Costs of Video Dialtone

As the Joint Petition and the Hatfield Study explain, the Uniform System of Accounts for telecommunications companies (USOA) does not adequately account for video dialtone costs.^{25/} The aggregation of video and telephone accounts will lead inevitably to cross-subsidization of the former.

^{23/} Comments of The Southern New England Telephone Company at 7 (filed May 21, 1993).

^{24/} See, e.g. Comments of NASUCA at 2 ("NASUCA agrees with the Joint Petitioners that existing separations procedures were not intended to deal with the problems that are present when voice, data, and video services are provided over the same facilities"); Comments of D.C. PSC at 4.

^{25/} Joint Petition at 16 ("[t]he fatal infirmity of the

The telephone companies argue that the Joint Petition misconstrues Part 32, claiming that USOA is not based on any cost allocation methodology and is not service-specific.^{26/} This, however, is precisely the point. As AT&T observes:

[U]nder the existing rules, the basic elements of the historical local network structure -- loops, trunks, local switches and tandem switches -- are not recorded separately in LEC accounting records. Absent separate accounts for these investment categories such as loops and trunks, the

As AT&T argues, moreover, the mere identification of costs in subaccounts is not sufficient to protect ratepayers from cross-subsidy arising from extant Bell Atlantic ventures. AT&T notes that in the Commission's order authorizing The Chesapeake and Potomac Telephone Company of Virginia ("C&P") to conduct a video dialtone experiment,^{29/} the Commission required C&P "to isolate the incremental costs of video dialtone services in separate subaccounts."^{30/} If the accounting rules provide no guidance for identifying such incremental costs, however, "LECs may claim -- as New Jersey Bell has done -- that video dialtone services impose no incremental costs for plant such as fiber trunks and loops or for the associated electronics."^{31/} Part 32 must be modified, AT&T states, "to ensure that LECs do not have the ability to subsidize services facing potential competition with revenues from other LEC services."^{32/}

Under the Communications Act, the Commission bears an affirmative obligation to ensure that carrier rates are "just and

^{29/} Order and Authorization, Application of The Chesapeake and Potomac Telephone Company of Virginia, File No. W-P-C-6834 (released March 25, 1993).

^{30/} AT&T Comments at 8.

^{31/} Id. AT&T finds that "[i]t defies credibility for LECs to claim that fiber and electronics installed solely for telephone use nevertheless just happens to have sufficient massive excess capacity down through the local loop that the fiber can also carry high bandwidth video dialtone services." Id.

^{32/} Id. at 8-9. See also Comments of NASUCA at 10-11 (supporting modifications to Part 32); Comments of D.C. PSC at 4 (same).

reasonable." Preventing inter-service subsidies in which telephone ratepayers bear the burden and risk of telephone company involvement in video dialtone is surely part of that obligation. New procedures are required to ensure against the cross-subsidization of video dialtone.

C. Access Charge and Price Cap Regulations Need to Be Revised to Prevent Telephone Ratepayer Subsidy of Video Dialtone

The Joint Petition noted that video dialtone appears to be a form of interstate access service through which video programming is routed to end users.^{33/} Unless the Commission amends its rules to establish a separate access charge category for video dialtone, video dialtone costs may be subsumed in other access services, resulting in cross-subsidy. Despite claims to the contrary by some of the telephone company commentators,^{34/} other

The Joint Petition also argued that video dialtone "does not fit into any of the [price cap] 'baskets' established for interstate access,"^{36/} and therefore called for a separate price cap basket for video dialtone. Unsurprisingly, telephone company commenters claim that a separate video dialtone price cap basket is unnecessary. While they attempt to argue that video dialtone fits within the existing baskets, however, they apparently cannot agree on which one. NYNEX, for example, calls for the bundling of private line "wideband" services and video dialtone.^{37/} Bell Atlantic calls for bundling video dialtone with "special access" services.^{38/} Illustrating the "flexibility" inherent in the current rules, BellSouth suggests that video dialtone might fit within any of the existing price cap baskets, "depending upon how the service is offered."^{39/}

If telephone companies are allowed to decide where to fit video dialtone service in the price cap regime, cross-subsidy is the likely result. Thus, AT&T agrees with Petitioners and supports modification of the price cap structure "to ensure that LEC rates for broadband services such as video dialtone are not artificially lowered and subsidized by increased rates for

^{36/} Joint Petition at 18.

^{37/} Comments of NYNEX at 14.

^{38/} Opposition of Bell Atlantic at 7.

^{39/} See BellSouth Comments at 14.

narrowband voice services."^{40/} "By aligning costs with the cost-causing services," observes AT&T, "the Commission will enhance the likelihood of a fair market test of unsubsidized competition between the LECs and other broadband service providers, such as cable companies."^{41/}

D. New Procedures Are Required to Segregate the Costs of Regulated and Non-Regulated Video Dialtone Services

Video dialtone service comprises not only the offering of a basic common carrier platform; it also includes enhanced gateways and other unregulated services. Current cost allocation rules do not provide a mechanism for earmarking and separating out the costs of enhanced video dialtone functions, and the Commission has not yet defined which enhanced functions would be subject to direct assignment and those that are likely to be classified within common cost categories.^{42/}

On this matter, the telephone companies maintain simply that existing rules are adequate and no action is required.^{43/} As a

^{40/} Comments of AT&T at 9. See also id. (a separate basket or band for video dialtone should be established to "ensure that the costs of broadband facilities are borne only by customers who choose to use those facilities").

^{41/} Id. at 9-10.

^{42/} Joint Petition at 19.

^{43/} See, e.g., Opposition of Bell Atlantic at 9; Opposition of Ameritech at 10; BellSouth Comments at 12.

NYNEX alleges that the Joint Petition contains certain technical errors with respect to Part 64 of the Commission's rules. Comments of NYNEX at 10-11. NYNEX's complaints address the specifics of appropriate cost allocation rules rather than the threshold question of whether there should be rules at all.
(continued...)

number of state regulators recognize, however, the Commission's Joint Cost Rules must be revised specifically to address video dialtone costs.^{44/} Along with other rule changes, such revisions are required to provide guidance to telephone companies and to "assist state regulators, consumer advocates, and others in their efforts to ensure that the implementation of video

^{43/} (...continued)

Indeed, by focusing on the details NYNEX appears to have moved beyond that threshold question.

For the most part, NYNEX has taken arguments contained in the Joint Petition out of context. For example, NYNEX correctly notes that current Commission rules do not allow accelerated depreciation. Id. at 10. The Joint Petition did not argue to the contrary. The passage that NYNEX cites was part of a general discussion of cross-subsidy incentives and devices.

Similarly, NYNEX argues that the Joint Cost Rules prevent carriers from adopting high common cost strategies as a cross-subsidy vehicle. Id. Once again, the passage of the Joint Petition cited refers to the need for rules to deter cross-subsidy. If, contrary to the findings of the recent GAO report cited in the Joint Petition (at 15 n.33), the Commission had the resources to effectively monitor compliance with Part 64, then the Joint Cost Rules could have some deterrent effect on efforts by telephone companies to use high common costs to cross-subsidize unregulated activities. However, the Joint Cost Rules do not apply to cost allocations among regulated services.

^{44/} See Comments of IURC and the MPSC Staff at 2 (procedures must be adopted to separate the costs of regulated and non-regulated video dialtone services); D.C. PSC Comments at 5 (Part 64 cost allocation manuals must be revised).

dialtone does not come at the expense of basic ratepayers or fair competition."⁴⁵/

**E. Video Dialtone-Specific Regulations Are Required to
Protect Consumers Against Joint Marketing and Customer
Privacy Abuses**

requirements of Section 631 of the Communications Act,^{51/} NYNEX asks for the application of customer privacy regulations to the cable industry.^{52/}

The adoption of video dialtone-specific joint marketing and CPNI regulations are necessary consumer and competitive protections. The Commission's failure to act thus far invites the telephone companies to take unfair advantage of their monopoly position. The Commission must remedy this obvious defect in its rules.

CONCLUSION

The Joint Petition demonstrates that unless the Commission adopts cost allocation and other implementing rules for video dialtone service, telephone ratepayers will subsidize video operations and competition in the video marketplace will be undermined. Consumer advocates, state regulators, and industry commenters concur. The Commission should proceed promptly to establish a Joint Board and institute a rulemaking to establish

^{51/} 47 U.S.C. § 551.

^{52/} Comments of NYNEX at 17.

comprehensive video dialtone-specific rules that safeguard consumers and ensure fair competition.

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I, Leslie B. Calandro, do hereby certify that copies of the foregoing Reply Comments of Consumer Federation of America and National Cable Television Association were served on each of the following by either hand delivery or first class mail, postage prepaid, this 7th day of June, 1993.

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